

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DONNA RENEE CITIZEN,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. EDCV 17-1505 AGR

MEMORANDUM OPINION AND ORDER

Plaintiff filed this action on July 27, 2017. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 14, 15.) On March 8, 2018, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issue and Plaintiff filed a request for judicial notice. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court affirms the decision of the Commissioner.

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PROCEDURAL BACKGROUND

3 Plaintiff filed applications for disability insurance benefits and supplemental
4 security income benefits. In both applications, Plaintiff alleged an onset date of May 31,
5 2013. Administrative Record (“AR”) 18. The applications were denied initially and on
6 reconsideration. AR 18, 112-13, 138-39. Plaintiff requested a hearing before an
7 Administrative Law Judge (“ALJ”). On November 19, 2015, the ALJ conducted a
8 hearing at which Plaintiff and a vocational expert (“VE”) testified. AR 37-70. On
9 January 27, 2016, the ALJ issued a decision denying benefits. AR 15-30. On May 31,
10 2017, the Appeals Council denied review. AR 1-6. This action followed.

11.

STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this court has authority to review the
14 Commissioner's decision to deny benefits. The decision will be disturbed only if it is not
15 supported by substantial evidence, or if it is based upon the application of improper
16 legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam);
17 *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18 “Substantial evidence” means “more than a mere scintilla but less than a
19 preponderance – it is such relevant evidence that a reasonable mind might accept as
20 adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether
21 substantial evidence exists to support the Commissioner’s decision, the court examines
22 the administrative record as a whole, considering adverse as well as supporting
23 evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than
24 one rational interpretation, the court must defer to the Commissioner’s decision.
25 *Moncada*, 60 F.3d at 523.

25 || *Moncada*, 60 F.3d at 523.

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DISCUSSION

A. Disability

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003) (citation and quotation marks omitted).

B. The ALJ's Findings

The ALJ found that Plaintiff met the insured status requirements through December 31, 2018. AR 20. Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹ the ALJ found that Plaintiff had the severe impairments of mild degenerative disc disease of the lumbar spine; history of gunshot wounds; asthma/history of bronchitis; post traumatic stress disorder; and anxiety. AR 21.

The ALJ found that Plaintiff had the residual functional capacity ("RFC") to perform light work. She could lift/carry up to 20 pounds occasionally and up to 10 pounds frequently; sit, stand or walk for six hours in an eight-hour workday with normal breaks; occasionally climb ramps and stairs but never climb ladders, ropes or scaffolds; frequently balance; occasionally stoop; frequently kneel and crawl; and occasionally crouch. She must avoid concentrated exposure to extreme heat, extreme cold and pulmonary irritants such as fumes, odors, dust and gases. She is limited to simple, routine and repetitive tasks, and can sustain attention and concentration skills sufficient

¹ The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant's impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1 to carry out work like tasks with reasonable pace and persistence. She is precluded
2 from interaction with the public and is limited to occasional interaction with coworkers.
3 AR 23. Plaintiff is unable to perform any past relevant work but there are jobs that exist
4 in significant numbers in the national economy that she could perform such as sorter,
5 packager and electronic worker. AR 28-29.

6 **C. Cross-Examination of Vocational Expert**

7 Plaintiff appeared at her hearing without an attorney or representative. AR 39-41.

8 The sole issue raised by Plaintiff is that the ALJ did not expressly offer her the
9 opportunity to question the vocational expert at the hearing. The ALJ questioned
10 Plaintiff and asked whether there was anything else that Plaintiff thought she should
11 know that was not asked. AR 63. The ALJ then examined the vocational expert, who
12 also asked questions of the Plaintiff. AR 64-69. After the ALJ finished asking questions
13 of the vocational expert, the following colloquy occurred:

14 ALJ: Thank you. Okay so Ms. Citizen, this is what I will do. I
15 will take into consideration all the evidence in the record,
16 including the written documentation, as well as the
17 testimony taken today. I'll issue a written decision and
18 get that out to you as soon as possible. Now is there
19 anything else that I need to know before I make this
20 decision? Anything that we haven't covered?

21 Clmt: Other than I don't like I don't like to be around certain people –

22 ALJ: Right.

23 Clmt: – because of my situation.

24 ALJ: Okay.

25 Clmt: That's what I had.

26 ALJ: All right. Okay, well thank you very much for coming. We're off the
27 record and thank you very much Mr. Leeth [the vocational expert].

28 Clmt: Thank you.

1 VE: Thank you.

2 AR 69.

3 “A claimant in a disability hearing is not entitled to unlimited cross-examination,
4 but rather ‘such cross-examination as may be required for a full and true disclosure of
5 the facts.’” *Solis v. Schweiker*, 719 F.2d 301, 302 (9th Cir. 1983) (citation omitted).

6 In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court addressed the
7 question of “what procedural due process requires with respect to examining
8 physicians’ reports in a social security disability claim hearing.” *Id.* at 402. The Court
9 concluded that examining physician reports may be received as evidence despite the
10 absence of cross examination “when the claimant has not exercised his right to
11 subpoena the reporting physician and thereby provide himself with the opportunity for
12 cross examination of the physician.” *Id.* “This inaction on the claimant’s part supports
13 the Court of Appeals’ view . . . that the claimant as a consequence is to be precluded
14 from now complaining that he was denied the rights of confrontation and cross-
15 examination.” *Id.* at 405.

16 Like the claimant in *Perales*, Plaintiff in this case did not request cross
17 examination of the vocational expert. Although Plaintiff was unrepresented, Plaintiff
18 was twice advised in writing of her right to question witnesses at the hearing. The
19 written denial of reconsideration advised Plaintiff that she had the right to request a
20 hearing before the ALJ and explained “How the Hearing Process Works.” AR 148. The
21 letter advised that, at the hearing, the “ALJ also can require people to bring important
22 papers to your hearing and give facts about your case. You can question these people
23 at your hearing.” AR 148. The ALJ’s Notice of Hearing advised Plaintiff that “[a]
24 vocational expert will testify at your hearing” and expressly stated that “You and your
25 representative (if you have one) may submit documents, present and question
26 witnesses . . .” AR 166-67. The Notice of Hearing attached the publication entitled

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1 "Your Right to Representation."² AR 169-70. Moreover, Plaintiff had previously filed an
2 application for benefits that was denied. AR 18. At that time, Plaintiff had been
3 represented by an attorney, and a vocational expert had appeared and testified at that
4 hearing. AR 74, 84. Plaintiff has not shown a violation of her procedural due process
5 rights. See *Hernandez v. Colvin*, 2015 U.S. Dist. LEXIS 131664, *4-*6 (C.D. Cal. Sept.
6 28, 2015).

7 It is not clear that the regulations require an oral advisement of the right to
8 question witnesses. The regulations provide: "We will advise you that you have the
9 following procedural rights in connection with the disability hearing process: . . . (4) You
10 may present witnesses and question any witnesses at the hearing." 20 C.F.R. §§
11 404.916(b)(4), 416.1416(b)(4).

12 Assuming that the failure to give an oral advisement of a claimant's right to
13 question witnesses at the hearing violates the regulations, Plaintiff has not shown a
14 substantial likelihood of prejudice. When "circumstances of the case show a
15 substantial likelihood of prejudice, remand is appropriate so that the agency can decide
16 whether re-consideration is necessary. By contrast, whe[n] harmlessness is clear and
17 not a borderline question, remand for reconsideration is not appropriate." *Marsh*, 792
18 F.3d at 1173 (quoting *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011)). Further,
19 when "the magnitude of an ALJ error is more significant, then the degree of certainty of
20 harmlessness must also be heightened before an error can be determined to be
21 harmless." *Id.*

22 Plaintiff has not shown that if she had been orally offered an opportunity to
23 question the vocational expert, she would have asked a particular question that would
24 have altered the outcome of the case. Plaintiff argues that she could have asked the
25 vocational expert how each representative job could permit her to sit, stand or walk for

27 ² After Plaintiff requested a hearing before the ALJ, Plaintiff was sent a letter and the
28 same publication concerning her right to representation. AR 158-59. The publication
noted that a representative can help by "questioning any witnesses." AR 158.

1 up to six hours in an eight-hour workday. However, a “mere” possibility or “probability is
2 not enough.”³ *McLeod*, 640 F.3d at 888; see *Terry v. Berryhill*, 2017 U.S. Dist. LEXIS
3 179552, *12-*14 (W.D. Wash. Oct. 30, 2017) (finding claimant had not shown
4 substantial likelihood of prejudice from ALJ’s failure to advise her of right to cross
5 examine vocational expert).

6 Plaintiff, who is now represented by counsel, requests judicial notice of online
7 searches and correlations to other job titles by an unknown person using O*NET
8 OnLine, the Occupational Outlook Handbook, and Employment Projections. Plaintiff
9 does not supply a declaration that would authenticate any of the searches or
10 correlations, or establish a foundation for the expertise of the unidentified person who
11 performed that work. Moreover, a court may judicially notice only “a fact that is not
12 subject to reasonable dispute because it: (1) is generally known within the trial court’s
13 territorial jurisdiction; or (2) can be accurately and readily determined from sources
14 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The
15 unauthenticated information does not fall within Rule 201(b). See *Leija v. Colvin*, 2015
16 U.S. Dist. LEXIS 39575, *15-*16 (E.D. Cal. Mar. 26, 2015).

17 To the extent Plaintiff argues that the ALJ did not fully and fairly develop the
18 record because she did not *sua sponte* take administrative notice of economic data in
19 other publications, that argument was rejected in *Shaibi v. Berryhill*, 883 F.3d 1102,
20 1109-10 (9th Cir. 2018).

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25 ³ Other areas of proposed cross examination would not have been material. For
26 example, even assuming that the total number of jobs in the nation for a given job title is
27 25,500, as Plaintiff argues, instead of 40,000, the existence of jobs in significant
28 numbers in the national economy would still be satisfied. *Gutierrez v. Comm’r*, 740
F.3d 519, 527-29 (9th Cir. 2014) (finding 2,500 jobs in California and 25,000 jobs
nationally satisfy legal standard).

IV.

ORDER

IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

DATED: May 8, 2018

Alicia G. Rosenberg

ALICIA G. ROSENBERG
United States Magistrate Judge